subsection (1) of section 18. To sum up, what counsel contends is that, under section 18(1), the moneylender's account of each loan shall clearly state in plain words the terms and transactions incidental to the account; that section 16(3) specifies that all the terms of the contract shall be distinctly shown: and that the plaintiff's account book (Ex. P3, fol. 57) failed to show that it was an agreed term of the contract, as borne out by the notice of demand, that interest was payable *monthly* and *without previous demand.* After careful consideration, I am satisfied that there are no merits whatever in this highly technical argument. It is to be remembered that subsection (3) of section 16 merely provides that the *rate* of interest shall be set out either in terms of so many per centum per annum or in the actual amount of such interest. To attempt to read into subsection (1) of section 18 and subsection (3) of section 16 further restrictions in a penal manner so as to render a claim unenforceable is a breach of accepted canons of construction which finds no favour with me. The essential fact is that the borrower was not even remotely likely to have been deceived, nor did he claim to have been under any misapprehension as to the rate or manner of payment of interest. For my own part, I do not think that if any moneylender keeps accounts, which for convenience, shows instantly the rate of accumulated interest at the end of any one month, he was thereby guilty of such a serious accounting misdemeanour that he loses all rights, by reason of subsection (2) of section 18, to enforce his claim at all.

Another further argument by counsel for the respondent is that a promissory note is a "security": see *Abirami Ammal* v. *Meyyappa Chettiar* [1]; *Ang Khye Pang* v. *Chop Ban Aik* [2]; *Subramaniam* v. *Konar* [3]; *Nihalchand Navalchand* v. *Macmullan* [4] and *Gulwant Singh* v. *Abdul Khalik* [5]; *ergo,* it was a term of the contract that a security should be provided and that such security should take the form of a promissory note, a fact not disclosed in the moneylender's account. In my opinion, the simple answer is that subsection (1) of section 18 is not to be read so that every term of the contract which is material under subsection (3) of section 16 must appear also in the books of account. The book of account is a horse of a different colour from a memorandum of the contract.

For the reasons stated above I would allow this appeal and order a retrial, all costs to abide the event.

Barakbah L.P. concurred.

Ismail Khan J.: I have had the benefit of reading the judgment of Ong F.J. with which I entirely agree and have nothing to add.

Appeal allowed.

Solicitors: *Eugene Lye & Co.; Skrine & Co.*

KOH HUNG KENG v. LOW PEE LORRY TRANSPORT CO. LTD.

[F.C. (Barakbah L.P., Ong Hock Thye F.J. and Ismail Khan J.) July 12, 1966]

[K.L. — Federal Court Civil Appeal No. X 22 of 1965]

Negligence — Road accident — Collision between two vehicles travelling in opposite directions — Whether there is presumption that both drivers were negligent.

Damages — Running-down action.

This was an appeal against the decision of the High Court which had dismissed a claim for damages in a running-down action. On appeal it was argued, *inter alia,* that the learned trial judge ought to have held that where, as in this case, there was a collision between two vehicles travelling in opposite directions, there was a *prima facie* presumption that both drivers were negligent.

Held: (1) on the evidence the learned trial judge was correct in rejecting the plaintiff's story;

(2) there is no absolute rule of law that where the court is unable to say which of the two parties was to blame, they must be held both to blame.

Cases referred to:—

(1) *Ong Yam Chong* v. *Chan Wah* [1962] M.L.J. 184.

(2) *Baker* v. *Market Harborough Industrial Co-operative Society Ltd.* [1953] 1 W.L.R. 1472, 1476.

(3) *France* v. *Parkinson* [1954] 1 All E.R. 759.

FEDERAL COURT.

Chew Kok Chooi for the appellant.

M. S. Naidu for the respondent.

Cur Adv. Vult.

Ong Hock Thye F.J.: This is an appeal by the plaintiff against the decision of the High Court at Malacca dismissing his claim for damages in a running-down action.

The accident occurred on October 21, 1962 at about 3.30 p.m. during fine weather, at or near a curve of the road between Malacca and Alor Gajah, while the plaintiff was alleged to be driving his motor car No. S. 5221 towards Alor Gajah. The defendants' lorry was travelling in the opposite direction, towards Malacca, with a four-ton load of fresh fish. By their statement of claim and defence the parties charged each other with negligently encroaching on the wrong side of the road at the bend and thereby causing the collision.

In the event the learned trial judge disbelieved the evidence of the plaintiff and his witnesses. Consequently, on their failure to discharge the onus of proof, the claim was dismissed with costs.

The appeal rests substantially on two

grounds, first, that the parties were bound by their respective pleadings and the defendants, having by their defence admitted that the plaintiff was the driver of the car as alleged in the statement of claim, it was contended the judge "erred in going outside the pleadings in allowing defendants' counsel to cross-examine the plaintiff" suggesting that he was not the driver of the car. Secondly, it was contended that, in any event, the learned judge "ought to have held that where, as in this case, there was a collision between two vehicles travelling in opposite directions, then, in the absence of special circumstances, there was a *prima facie* presumption that both drivers were negligent".

As to the first ground above-stated, I am clearly of opinion that a wide latitude should be permitted in cross-examination, especially when it is directed towards shaking the credit of a witness, as in this case. *A fortiori,* it is too late to raise objection to any line of cross-examination on appeal when no objection thereto had been made during the cross-examination itself. In any event the decision was not based at all on the said admission in the defence, but rather on other evidence leading the judge to reject the plaintiff's story completely.

It was the plaintiff's story, supported by the two passengers in his car, that he was thrown out of the driving seat by the impact causing the front offside door to fly open. The version of the defendants' driver and lorry attendant, on the other hand, was that, after the collision, they found two persons attending to an injured person whom they found still seated on the right back seat of the car and helping him out of this vehicle.

Not only did the learned trial judge express himself as satisfied that the evidence of the defendants' driver and lorry attendant was substantially true, but he also went on to give three reasons why he could not accept the plaintiff or his two companions as witnesses of truth. In the first place, because the evidence of the photographs and the police corporal who investigated the case negatived any damage to the driver's door, he concluded that the story of the plaintiff falling out could not be true. In the second place, he considered that there was a material discrepancy between the plaintiff's evidence in court and the statement of fact contained in his police report "that he got out of the car and collapsed". On this point the learned judge explained his views in these words:

> "Either what he told me in court three years after the accident is true or what he told the police soon after the accident must be true. If what he told the police was true, which of course is not evidence in this case, I can find no explanation as to how he got that very serious injury on his right elbow, particularly in view of my finding that there was no damage to the front offside door of the car. If he had told me that he was driving with his arm resting on the window of the car and that the lorry had grazed against his arm that would be satisfactory explanation of the injury. If his story that he fell out of the car on the grass is to be accepted as being true, I can well believe his sustaining a fracture of the elbow, but I can find no explanation for the deep cut which he had in the vicinity of the elbow".

With respect, what precisely the plaintiff stated in his police report was that the lorry "took too much to its right and knocked into my car, hitting the offside rear mudguard and door . . . *I came out through the door and fell*". Speaking for myself, I do not think that the words "came out" necessarily precluded their interpretation to mean falling out. The relevant phrase in Malay was "dan saya lalu keluar dari pintu jatoh etc." I should add that I make this observation in no spirit of carping criticism, but merely to make it clear that I am fully prepared to make every allowance in favour of the plaintiff. Having said so I must, however, declare that I am fully in agreement with the conclusion reached by the learned trial judge.

In my opinion the plaintiff's story and the evidence of his witnesses cannot but inspire amazed incredulity for the following reasons. First, there is the complete absence of any sign of damage to the driver's door or, for that matter, any structural damage to the car. I think that nothing less than an extremely violent impact causing structural damage could have forced the door open, and even then, any driver with a firm grip on the steering wheel, in anticipation of an accident, should not easily have lost such grip. Secondly, if the plaintiff was thrown out through the off-side door as alleged, he should have been found sprawling on the road surface instead of on the near-side grass verge where the two passengers alleged they found him on alighting. A passenger seated beside the driver might have been expected to fall out on to the nearside grass verge, certainly not the driver. Thirdly, the car came to rest in the ditch not more than 30 feet past where the plaintiff was lying on the grass, according to one passenger, while, according to the other, this distance was only about 20 feet. Yet, according to the latter, "After the collision the driver of the car was thrown out. I tried to use my right hand to turn the steering wheel towards the right and I used my left hand to wake up Mr. Lee. I grabbed the steering wheel with my right hand and turned it to the right. I did this in order to stop the car from going into the ravine on the left. The car went as far as the ditch and stopped". The speed of the car, according to this witness, was about 30 m.p.h. Hence it is demonstrably impossible for him to have performed the entire feat which he described in the space of less than the one second taken by the car to traverse 30 feet. Fourthly, the nature of

the wound below the elbow was clearly more consistent with the plaintiff being a back-seat passenger resting his elbow on the window, not anticipating any accident. If he was indeed driving as alleged, then he was plainly negligent by attempting to steer only with one hand around a bend. Having seen the lorry approach in the manner described, he could have had both hands on the steering wheel, not only to ensure better control of the car, but also to save his elbow from any possible contact with the lorry. Fifthly, that the gash wound could not have resulted from a mere fall on the grass fortifies further my belief that his story was wholly untrue. Such being the result, the claim naturally must fail as it did.

Only one other point in the evidence requires brief mention in connection with the second main ground of appeal. It was argued that the evidence given by Shanmugam, the taxi driver, of having observed a trail of water on the right side of the white middle line of the road, facing Malacca was evidence of the lorry encroaching on the wrong side. The judge did not consider the fact sufficiently material and, with respect, I agree. The evidence was vague and says nothing about the trail being merely an inch or a yard to the right of the middle line. In the latter case it might have been relevant. In the former, however, the usual camber of the road along a curve might well have caused the water from melting ice to drop over the side of the lorry without that vehicle necessarily being over the middle line. *Ong Yam Chong* v. *Chan Wah* [1] was cited by appellant's counsel as authority for the proposition that, where the court was unable to say which of two parties was more to blame, they must be held both to blame and equally to blame, following certain *dicta* in *Baker* v. *Market Harborough Industrial Co-operative Society Ltd.* [2] I think I should point out that in *Ong Yam Chong's* case I held that "both drivers were clearly road-hogs" and hence both were at fault. The warning there uttered by Thomson C.J. (as he then was), if heeded, should enable advocates to see *Baker's* case and *France* v. *Parkinson* [3] in their proper perspective.

I would dismiss this appeal with costs.

Barakbah L.P. concurred.

Ismail Khan J.: I have had the benefit of reading the judgment of Ong F.J. with which I entirely agree and have nothing to add.

Appeal dismissed.

Solicitors: *Donaldson & Burkinshaw; Braddell & Ramani.*

LIM SOH MENG & ANOR. v. KRISHNAN

[F.C. (Barakbah L.P., Ong Hock Thye F.J. and Ismail Khan J.) July 12, 1966]

[K.L. — Federal Court Civil Appeal No. X 10 of 1966]

Road accident — Inferences drawn by trial judge — Whether appellate court can differ from trial judge — Onus of proof.

Damages — Running-down action.

Practice and Procedure — Inference — Story of plaintiff and defendant equally disbelieved — Onus.

This was a claim for damages in a running-down action. The learned trial judge rejected the evidence of the plaintiff and that of the defendant but went on to say "In my judgment the real reason for the second defendant to swerve his car to the right was to avoid the schoolchildren who must have suddenly started crossing the road from the left in order to enter the estate road from a point almost directly opposite the road. The second defendant therefore must have swerved to his right before he came abreast of the estate road. He must have swerved almost to the other edge of the road and having thus avoided the children, he must have started swerving slightly back to the left when his car hit the plaintiff from directly in front. The plaintiff may not have been riding his bicycle along the edge of the road. He may have been within two or three feet of the edge of the road when he was hit and when he was hit the car was coming to his left". He gave judgment for the plaintiff.

Held: (1) where as in this case the story of the plaintiff and of the defendant has been equally disbelieved, the learned trial judge should have decided the case on the onus of proof;

(2) the inferences drawn by the learned trial judge were not supported by the facts and therefore the appeal must be allowed.

Case referred to:—

(1) *Robins* v. *National Trust Co.* [1927] A.C. 515, 520.

FEDERAL COURT.

N. A. Marjoribanks for the appellants.

S. Kulasegaram for the respondents.

Cur. Adv. Vult.

Ong Hock Thye F.J.: This is an appeal by the defendants against a judgment of the High Court in Kuala Lumpur awarding damages to the plaintiff in a running-down action.

The plaintiff was a labourer employed by the Banting Town Board. His daily work was as a scavenger from 3 a.m. to 6 a.m., and after a two-hour break, he would resume his labours cleaning the toilets in the market from 8 a.m. to 1 p.m. On January 21, 1963 he was returning home by bicycle after the day's work when he collided with a motor-car owned by the first defendant which was driven by the second defendant. As a result of the accident he suffered a severely crushed left hand and a crush injury to the shoulder, almost paralysing his right arm. The writ was issued on August 26, 1963; the hearing occupied two days, exactly two years later and judgment was delivered by Gill J. on February 4, 1966 in favour of the plaintiff.

The plaintiff in his statement of claim